BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KEITH A. BUTLER	)	
Claimant	)	
	)	
VS.	)	
	)	
RUSSELL REGIONAL LIVESTOCK	)	
Respondent	)	Docket No. 1,052,372
	)	
AND	)	
	)	
TRAVELERS INDEMNITY COMPANY	)	
Insurance Carrier	)	

ORDER

Both claimant and respondent request review of the March 14, 2011 preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore.

ISSUES

The Administrative Law Judge (ALJ) denied claimant's preliminary hearing requests after finding that claimant failed to sustain his burden of proof of personal injury by accident arising out of and in the course of his employment with respondent. The ALJ's Order is silent on the issue of timely notice as required by K.S.A. 44-520, although an earlier preliminary hearing transcript[1] seems to suggest that the ALJ found that notice was satisfied but that express finding was not included in his earlier Order, nor was there any express finding of notice in the Order that is the subject of this appeal.

Claimant requests review of whether claimant met with personal injury arising out of and in the course of his employment. Claimant argues that the Order should be reversed as it is clear that claimant sustained personal injury arising out of and in the course of his employment.

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[1] P.H. Trans. (Nov. 12, 2010).

Respondent has also appealed and asks the Board to review and reverse the ALJ's findings with respect to notice. Respondent contends that while its employees knew of an event occurring on March 18, 2010 involving claimant and a rank cow, claimant never provided the specific notice contemplated by K.S.A. 44-520. Thus, in addition to failing to establish that his alleged injury arose out of and in the course of his employment with respondent, respondent asserts that claimant's request for benefits should be denied because of his failure to establish the requisite notice.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

The record contains a previous preliminary hearing transcript along with a number of depositions from various individuals, including claimant, his co-workers, a supervisor, respondent's owner as well as a local veterinarian who was present on March 18, 2010, the date claimant maintains he was injured. Highly summarized, claimant alleges he sustained an injury to his low back as a result of an encounter with a rank cow at respondent's sale barn on March 18, 2010. Claimant described the incident as follows:

> A. She come through the gate there, just caught me off guard as she came through there, so I had my hands up on her head, trying to get away from her. And she's pushing me back, and the back of my feet, I knew I was going to hit them steps that was right there, and so when I did that, I turned to go up the steps and to make another step to go around to the catwalk. And as soon as I turned to make that step, then she hits me in my right hip, about three or four times, head butting me. And then I made it up the steps and around the catwalk, at the same time J.L. shuts the door so the cow wouldn't go inside the block, which I could understand, you know, you don't want that cow in there.[2]

Each of the witnesses confirms, in one way or another, that there was a rank cow that caused some disruption during the sale on March 18, 2010 and that claimant was in the general vicinity of this rank cow. There is one witness, John Kendall Ellis, who says he saw the cow charge claimant, causing him to drop to the floor. But claimant denies that occurred. Rather, he describes a more violent event that caused him to go up some stairs, and expressly denies he was ever on the floor with the cow on top of him.[3]

Following that first preliminary hearing, the ALJ denied claimant's request for benefits as he concluded that claimant failed to establish that he sustained an accidental injury which arose out of and in the course of his employment with respondent on

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[2] *Id.* at 22.

[3] *Id.* at 89.

March 18, 2010.[4] Although there was no dispute that claimant had a close encounter with a rank cow, precisely what happened during this event was largely in dispute and the record was silent on the connection between claimant's physical complaints and the March 18, 2010 incident.[5]

Following that first preliminary hearing, the ALJ issued an Order that contained the single finding that claimant had failed to establish an injury that arose out of and in the course of his employment with respondent.[6] The record shows that claimant's recitation of the accident and its connection to his present request for medical treatment was , in the ALJ's view, not sufficiently corroborated by the witnesses or the medical records. Simply put, claimant failed to seek immediate treatment for what he describes as a rather violent and acute injury and what medical testimony was offered failed to take into account claimant's other jobs (with other sale barns) and his own personal farm work. The ALJ verbally indicated that claimant had satisfied the statutory requisites of notice[7], but his Order makes no such formal findings, nor was it necessary given the ALJ's initial finding.

Thereafter, a second preliminary hearing was held, building on the earlier evidence, and further supported by additional medical reports from Dr. Paul Stein. These reports reflect conversations with both parties' counsel and taken as a whole, Dr. Stein has now opined that *if* claimant's recitation of the events of March 18, 2010 are true, then he maintains claimant's present need for treatment is, more probably true than not, due to the March 18, 2010 accident.

Claimant also testified at this second hearing and attempted to explain the contents of a chiropractic medical record which was made on April 15, 2010. Claimant first sought medical treatment for low back complaints on April 15, 2010 from Dr. Hair. The identity of this chiropractor was unknown at the time of the first preliminary hearing, but was later discovered. This single office note indicates that claimant was complaining of low back pain that began 6 weeks before, with "no specific accident stated".[8] Claimant maintains he told Dr. Hair of the incident with the cow, but has no explanation for why it is not contained in the office note. And he denies telling Dr. Hair the pain began 6 weeks before, as his accident was March 18, 2010.

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[4] ALJ Order (Nov. 12, 2010).

[5] P.H. Trans. (Mar. 11, 2011) at 29-31.

[6] ALJ Order (Nov. 12, 2010).

[7] P.H. Trans. (Nov. 12, 2010) at 121.

[8] *Id.* (Mar. 11, 2011), Resp. Ex. A.

The ALJ considered the additional testimony and concluded that claimant had failed, again, to meet his burden of establishing an injury arose out of and in the course of his employment with respondent. Just as before, the ALJ found that notice was established, but he believed that the medical opinion of Dr. Stein was lacking. The ALJ was also troubled by the contents of Dr. Hair's report of April 15, 2010 which failed to note a work related injury. Simply put, the ALJ was not persuaded that claimant's present complaints of low back pain were attributable to the events of March 18, 2010 while in respondent's employ.

Claimant filed this appeal and takes issue with the ALJ's ultimate conclusion. Respondent also appealed the issue of notice. Both are asking the Board to reverse the ALJ's decision to the extent the decision is adverse to their cause.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[9] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[10]

In order for a claimant to collect workers compensation benefits he must suffer an accidental injury that arose out of and in the course of his employment. The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when it is apparent to the rational mind, upon consideration of all circumstances, that there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment.[11]

The ALJ concluded that claimant had failed to meet his burden of proving that there was a causal connection between the event he described as occurring on March 18, 2010 and his present low back complaints. This failure stems from his assessment of claimant's lack of credibility as it relates to the facts and circumstances surrounding the event, the inconsistency in the medical records as to the onset of his complaints and their connection to his work activities and, in large part, the fact that claimant continued to work elsewhere and on his own farm, performing the same or more strenuous duties. Even more problematic, these other activities were not disclosed to Dr. Stein *and his opinions were specifically premised upon claimant's credibility*. And it is unclear whether Dr. Stein knew

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[9] K.S.A. 2009 Supp. 44-501(a).

[10] K.S.A. 2009 Supp. 44-508(g).

[11] *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

that claimant's first chiropractic treatment came on April 15, 2010 and specifically excluded any reference in that record to a work-related injury. Given these concerns, the ALJ found that claimant had failed to meet his evidentiary burdens in this matter.

This Board Member has concluded the ALJ's Order should be affirmed. Like the ALJ, there are simply too many troubling aspects to this claim that cause this finder of fact to question the connection between claimant's present complaints and the events of March 18, 2010. While it is true that most of the medical records that were created after April 15, 2010 reference a work-related injury, the initial visit to Dr. Hair did not and it is disconcerting that claimant could not recall the identity of that physician even when asked. Moreover, even after the first preliminary hearing, it does not appear that Dr. Stein was provided a complete picture of the claimant's work activities and private farming duties. Thus, his opinion that claimant's present complaints are attributable to the March 18, 2010 event, an opinion that was expressly predicated upon claimant's own credibility, is seriously compromised. For these reasons, the ALJ's Order is affirmed in its entirety.

Although respondent has appealed the issue of notice, the ALJ's Order does not contain any reference to that issue. Admittedly, there is some narrative within the hearing transcript that indicates that he concluded (again) that claimant had provided timely notice as required by K.S.A. 44-520, but it is clear from the Order, that he made no such formal finding and it cannot be inferred because he denied compensation. In light of the ALJ's ultimate decision and this Board Member's decision to affirm that Order, respondent's appeal of the notice issue is moot.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[12] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Bruce E. Moore dated March 14, 2011, is affirmed.

[12] K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of May 2011.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
William L. Townsley, III, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge